Yew Yin Lai v Teo Meng Hai & Anor

HIGH COURT (MELAKA) — DIVORCE PETITION NO MT1-33–135 OF 2003
HALIJAH ABBAS J
11 DECEMBER 2012

Family Law — Divorce — Adultery — Ancillary reliefs — Whether adultery had been committed — Divorce on ground of adultery — Whether person who committed adultery could be condemned in damages — Law Reform (Marriage and Divorce) Act 1976 ss 53 & 54(1)(d)

Family Law — Matrimonial assets — Matrimonial home — Entitlement of properties or in alternative, share proceeds of sale of properties

In the present application, the petitioner filed for, inter alia, divorce under ss 53 and 54(1)(d) of the Law Reform (Marriage and Divorce) Act 1976 ('the Act') against the respondent and for damages over alleged adultery, under ss 58 and 59 of the Act against the co-respondent. The petitioner also sought ancillary reliefs, inter alia, RM175,000 which was half share of the matrimonial home; RM500,000 as lump sum payment as division of matrimonial properties; that the co-respondent be condemned under s 58(2) of the Act. However, the respondent disputed the petitioner's other claims and filed counterclaims against the petitioner for: RM182,500 as the respondent's purported loan to the petitioner; RM368,000 for the sale of Kluang Rubber Co shares; and half share of three-storey shop lot bought by the petitioner. The issues that arose before the court were, inter alia, whether the respondent had committed adultery with the co-respondent; whether the petitioner was entitled to an order of divorce on the ground of adultery between the responden and the co-respondent; whether the co-respondent might be condemned in damages for committing adultery with the respondent; whether the petitioner was entitled to have all the property together with the two-storey semi-detached house built on it; whether the respondent was entitled claim half of undivided share in the land with a unit of three-storey shop house or, in the alternative, to share the proceeds of the sale of the said shop house.

Held, allowing the application:

(1) There must be a clear proof of adultery. The prevailing standard of proof to establish a matrimonial offence like adultery beyond reasonable doubt. Adultery had to also be inferred from the circumstances which exclude any presumption of innocence in favour of a person against whom it is

alleged. Proof of adultery must be of such character as would lead a reasonable man to conclude no other inference than the misconduct. Mere probability is not enough. No implicit reliance can be placed on the bald statement of the wife for recording a finding of adultery against the husband. In the present case it was not bald statement, but strongest circumstantial evidence with high degree of probability of beyond any reasonable doubt. The facts in evidence, partly direct, partly circumstantial, measured up to the requisite standard of proof for the matrimonial offence of adultery. Adultery had been proven (see paras 48–49, 51).

(2) The court would not, as a general rule, infer adultery from evidence of opportunity alone, but would require some more satisfactory proof. In the present case, it had been proven that there was no other explanation for the conduct of the respondent other than that there was indeed an affair. The respondent and co-respondent had all the opportunity. The respondent had once before admitted to the petitioner, that he did have extra marital affair. He was forgiven by the petitioner. The inference of adultery arises when there was proof of the disposition of parties to commit adultery, together with the opportunity to commit it (see paras 66–67).

(3) Based on oral and documentary evidence adduced by the petitioner and her witnesses, the petitioner had established a case in law for the co-respondent to answer. That being the case, the co-respondent failed to show that the evidence of the petitioner in support of her claim was so unsatisfactory or unreliable that the burden of proof on the petitioner of relevant issues had not been discharged (see para 88).

(4) The respondent voluntarily injected the capital into the motor business, which was set up by the respondent for the petitioner, allegedly to keep her busy. The court found that it was not the other way round as alleged by the respondent in his submissions that the petitioner was doing this car business was also busy with her life insurance work therefore always busy and neglected the family (see para 96).

(5) The co-respondent who had contributed to the breakdown of the marriage was to pay damages of RM50,000 with 4% interest from the date of judgment until full realisation. The Act does not punish the adulterous party personally, or inflicted any pecuniary penalty. Considering the circumstances that the co-respondent caused the breakdown of petitioner's family, caused the petitioner untold anxiety, emotional trauma and great mental agony. The co-respondent had stolen the petitioner's husband and deprived his wife of a happy and peaceful mind in the latter's otherwise blissful wedded life. Damages for the aggrieved spouse's feelings and unhappiness were impossible to establish mathematically (see para 167).

[Bahasa Malaysia summary

Dalam permohonan ini, pempetisyen telah memfailkan, antara lain, perceraian di bawah ss 53 dan 54(1)(d) Akta Membaharui Undang-Undang (Perkahwinan dan Perceraian) 1976 ('Akta') terhadap responden dan ganti rugi atas dakwaan zina, di bawah ss 58 dan 59 Akta terhadap responden bersama. Pempetisyen juga memohon relief sampingan, antara lain, sebanyak RM175,000 iaitu separuh daripada nilai rumah kelamin; RM500,000 sebagai bayaran sekali gus bagi pembahagian harta sepencarian; agar responden bersama dihukum di bawah s 58(2) Akta. Walau bagaimanapun, responden mempertikaikan tuntutan-tuntutan lain pempetisyen dan memfailkan tuntutan balas terhadap pempetisyen bagi: RM182,500 iaitu jumlah pinjaman daripada responden kepada pempetisyen; RM368,000 bagi jualan saham Kluang Rubber Co; dan separuh daripada perkongsian rumah kedai tiga tingkat yang dibeli oleh pempetisyen. Isu-isu yang timbul di hadapan mahkamah adalah, antara lain, sama ada responden telah berzina dengan responden bersama; sama ada pempetisyen mempunyai hak ke atas perintah perceraian atas dasar perzinaan antara responden dan responden bersama; sama ada responden bersama boleh dihukum dengan ganti rugi kerana berzina dengan responden; sama ada pempetisyen berhak mendapat kesemua hartanah bersama-sama dengan rumah berkembar dua tingkat yang dibina di atasnya; sama ada responden berhak ke atas separuh tuntutan saham yang belum dibahagikan bagi tanah dengan satu unit rumah kedai tiga tingkat atau, secara alternatifnya, untuk berkongsi hasil jualan rumah kedai tersebut.

Diputuskan, membenarkan permohonan:

(1) Mestilah terdapat keterangan jelas bahawa berlakunya perzinaan. Standard pembuktian untuk membuktikan suatu kesalahan dalam perkahwinan seperti zina adalah melampaui keraguan munasabah. Zina juga boleh disimpulkan daripada hal keadaan yang tidak termasuk sebarang anggapan tidak bersalah memihak kepada orang yang didakwa. Bukti zina mestilah satu yang mana akan membuatkan seorang lelaki yang munasabah membuat kesimpulan bahawa tidak terdapat inferens mengenai salah laku. Kebarangkalian semata-mata adalah tidak mencukupi. Tiada pergantungan tersirat boleh diletakkan atas kenyataan isteri semata-mata untuk merekodkan suatu dapatan zina terhadap suami. Dalam kes ini, ia bukanlah kenyataan semata-mata, tetapi keterangan ikut keadaan yang kukuh berserta dengan tahap kebarangkalian yang tinggi melampaui sebarang keraguan munasabah. Fakta-fakta dalam keterangan, sebahagiannya secara langsung, sebahagiannya mengikut keadaan, mencapai standard pembuktian yang diperlukan bagi kesalahan dalam perkahwinan iaitu zina. Zina telah dibuktikan (lihat perenggan 48–49 & 51).

(2) Mahkamah tidak akan, sebagai peraturan am, menyimpulkan perzinaan berdasarkan keterangan peluang semata-mata, tetapi akan

mengkehendaki beberapa keterangan yang lebih memuaskan. Dalam kes ini, telah terbukti bahawa tiada penjelasan lain bagi perlakuan responden selain daripada bahawa dia sememangnya mempunyai hubungan sulit. Responden dan responden bersama mempunyai kesemua peluang tersebut. Responden pernah mengaku kepada pempetisyen sebelum ini bahawa dia mempunyai hubungan sulit. Dia telah dimaafkan oleh pempetisyen. Kesimpulan zina timbul apabila terdapat keterangan yang cenderung kepada fakta bahawa pihak-pihak telah berzina, bersama-sama dengan peluang untuk melakukannya (lihat perenggan 66–67).

(3) Berdasarkan keterangan lisan dan dokumentari yang dikemukakan oleh pempetisyen dan saksi-saksinya, pempetisyen telah membuktikan kes perundangan untuk ditangkas oleh responden bersama. Oleh itu, responden bersama gagal untuk membuktikan bahawa keterangan pempetisyen dalam menyokong tuntutannya adalah amat tidak memuaskan atau tidak boleh dipercayai hinggakan beban pembuktian atas pempetisyen mengenai isu-isu yang relevan belum lagi dilepaskan (lihat perenggan 88).

(4) Responden telah secara sukarelanya menyumbangkan modal kepada perniagaan motor, yang ditubuhkan oleh responden untuk pempetisyen, kononnya untuk memastikan masanya terisi. Mahkamah mendapati bahawa ia bukanlah sebaliknya seperti yang didakwa oleh responden dalam hujahannya bahawa pempetisyen yang telah menjalankan perniagaan kereta ini juga sibuk dengan kerjaya insuransnya dan oleh itu sentiasa sibuk dan mengabaikan keluarga (lihat perenggan 96).

(5) Responden bersama yang telah menyumbang kepada perpecahan perkahwinan haruslah membayar ganti rugi sebanyak RM50,000 dengan faedah 4% daripada tarikh penghakiman sehingga direalisasikan sepenuhnya. Akta tidak secara sendirinya, menghukum pihak-pihak yang berzina atau mengenakan apa-apa hukuman kewangan. Melihatkan bahawa responden bersama telah menyebabkan perpecahan keluarga pempetisyen, menyebabkan kebimbangan tidak terperi, trauma emosi dan penderitaan mental yang hebat kepada pempetisyen. Responden bersama telah merampas suami pempetisyen dan menafikan responden daripada fikiran yang menggembirakan dan menenangkan dalam alam perkahwinan seperti yang sepatutnya. Ganti rugi untuk perasaan dan rasa tidak puas hati pasangan yang terkilan adalah mustahil untuk dihitung (lihat perenggan 107).]

Notes

For cases on adultery, see 7(2) *Mallal's Digest* (4th Ed, 2011 Reissue) paras 3549–3566.

For cases on matrimonial home, see 7(2) *Mallal's Digest* (4th Ed, 2011 Reissue) paras 4121–4122.

Cases referred to

Chaw Anui v Tan Kim Chai [2004] 4 MLJ 272, HC (folld)
Dastane v Dastane AIR 1975 SC 1534, SC (refd)
Doris Howell v Pui Jin Kong & Anor [1998] MLJU 395; [1999] 1 AMR 476, HC (folld)
G (The Husband) v M (The Wife) (1885) 10 AC 171, SC (refd)
Karen Cheong Yuen Yee v Phua Cheng Chuen [2004] MLJU 291; [2004] 7 CLJ 102, HC (distd)
Koay Cheng Eng v Linda Herawati Santoso [2008] 4 MLJ 863; [2008] 4 CLJ 105, CA (folld)
Lafarge Concrete (M) Sdn Bhd v Hasrat Usaha & Anor Mahkamah Tinggi Kuala Lumpur GS No D10–22–1484 of 2005 (refd)
Lalit Lazarus v Lavina Lazarus 1979 Jab LJ 299 (refd)
Lim Siaw Ying v Wong Seng & Anor [2009] 4 MLJ 409, HC (folld)
Loveden v Loveden (1810) 2 Hag Con, 1 (refd)
Mayo v Mayo [1948] 2 All ER 869 (refd)
Miller v Minister of Pensions [1947] 2 All ER 372, KBD (refd)
Mohan Singh v Malkiyat Kaur [1978] 2 MLJ 181, CA (folld)
Morton v HM Advocate 1938 JC 50, HC (refd)
Ong Boon Hua @ Chin Peng & Anor v Menteri Hal Ehwal Dalam Negeri, Malaysia [2008] 3 MLJ 625, CA (folld)
Sundram v Arujunan & Anor [1994] 3 MLJ 361, SC (folld)
Takako Sakao (f) v Ng Pek Yuen (f) & Anor [2009] 6 MLJ 751, FC (folld)
UN Pandey v Hotel Marco Polo Pte Ltd [1980] 1 MLJ 4; [1978–1979] SLR 490 (refd)
Veronica Sharkey or Little Elaine Freida Haggarty v Her Majesty's Advocate 1983 SCCR 56 (refd)
Wee Hock Guan v Chia Chit Neo & Anor [1964] 1 MLJ 217 (folld)
Yew Yin Lai v Teo Meng Hai & Anor [2007] 4 MLJ 703, HC (refd)
Yoong Sze Fatt v Pengkalen Securities Sdn Bhd [2010] 1 MLJ 85; [2010] 1 AMR 448, CA (folld)

Legislation referred to

Births and Deaths Registration Act 1957 ss 13, 13A(2)
Evidence Act 1950 ss 101, 106
Law Reform (Marriage and Divorce) Act 1976 ss 53, 54(1)(d), 58, 58(2), (3)(b), 59, 76, 76(2), 78

Mogan Karuppiah (Mogan Karuppiah) for the petitioner.
Chew Wee Kian (HS Chew & Co) for the respondent.
Moi Teik Seng (Moi Teik Seng & Partners) for the co-respondent.

Halijah Abbas J:

[1] The petitioner was lawfully married to the respondent at on 21 October 1983. They cohabited at No 58-H, Kg Empat off Jalan Ong Kim Wee, 75300 Melaka ('the matrimonial home'). After her marriage has been irretrievably broken down, the petitioner filed for, inter alia, divorce under ss 53 and 54(1)(d) of the Law Reform (Marriage and Divorce) Act ('the Act'). She also sued the co-respondent for damages over alleged adultery, under ss 58 and 59 of the Law Reform (Marriage and Divorce) Act.

[2] In her petition, besides divorce, the petitioner had sought ancillary reliefs namely:

(a) that the petitioner be paid maintenance RM2,000 a month for 15 years amounting to RM360,000 or a lump sum payment of RM250,000;

(b) arrears of maintenance at the rate of RM2,000 per month for 108 months from 28 July 2003–28 July 2012 amounting to RM216,000;

(c) RM175,000 which is half share of matrimonial home No 58H, Jalan Ong Kim Wee, Melaka;

(d) RM500,000 as lump sum payment as division of matrimonial properties;

(e) the co-respondent be condemned under s 58(2) of the Act;

(f) interest at the rate of 8% on all sums claimed until full realisation; and

(g) costs of proceedings RM75,000.

[3] The claim for maintenance namely prayers 13(2)–(5) in the petition for the daughter Teo Shi Wei, who was a minor at the time of filing this proceedings was abandoned by the petitioner mid-way through the trial because she had attained the age of majority before the conclusion of the trial.

[4] The respondent however disputed the petitioner's other claims and he filed counterclaims against the petitioner for:

(a) RM182,500 as the respondent's purported loan to the petitioner;

(b) RM368,000 for the sale of Kluang Rubber Company shares; and

(c) half share of three storey shop lot bought by petitioner at Lot 370 Kawasan Bandar XXXIX, Taman Melaka Raya, Melaka Tengah, Melaka.

[5] Both the petitioner and respondent agreed that the marriage should be dissolved. The petitioner obtained divorce from the respondent when the court

on 30 December 2010 granted *decree nisi* and the case has since been adjourned for trial for hearing of the petitioner's other claims and the respondent's counterclaims.

[6] From the date of filing of the petition, until the ultimate conclusion of this case, the trial has been punctuated by numerous interlocutory applications. This trial has taken about 17 of full hearings to complete, hence this lengthy judgment.

ISSUES TO BE TRIED

[7] The parties framed the following as issues to be tried (*'ikatan G'*):

(a) whether the respondent has committed adultery with the co-respondent, and whether petitioner is entitled to an order of divorce on the ground of respondents have committed adultery with the co-respondent;

(b) whether Yau Jia Ying also known as Jasmine Yau born on 16 January 2000 and Yau Jia Han born 4 August 2002 are two illegitimate children born to respondent with the co-respondent;

(c) whether the co-respondent *bersama* may be condemned in damages for committing adultery with the respondent;

(d) whether the petitioner is entitled to claim maintenance from the respondent from the date of filing this petition until the petitioner remarries;

(e) whether the sum of RM500,000 forming the marital assets acquired by the petitioner and the respondent during the time of their marriage, through their joint efforts to be paid by the respondent to the petitioner;

(f) whether the petitioner is entitled to have all the property together with the building thereon being a 'two-storey semi-detached' house, known as No 58H, Kampung Empat, Jalan Ong Kim Wee, Melaka ('the said house') transferred and registered in the name of the petitioner,and to be held by her for her own use;

(g) whether the petitioner is required to refund the money amounting to RM182,500 together with 2000 Kluang Rubber Company (Malaya) Bhd shares which the respondent was forced to sell by EON Bank Bhd; and

(h) whether the respondent is entitled claim ½ of undivided share in the land known as Lot 370, Kawasan Bandar XXXIX, District of Central Melaka, Melaka together with a unit of three storey shop house of address

Nos 584, 584A, and 584B, Taman Melaka Raya, 75000 Melaka or, in the alternative, to ½ share of the proceeds of the sale of the said 3-storey shop house.

THE EVIDENCE

The petitioner's case

[8] The petitioner called five witnesses including herself as the second witness. The first witness Wong Siew Keng ('SP1') is the babysitter who looked after co-respondent's first daughter at one time. She was a simpleton and gave straightforward evidence. She is an uniterested party. She is a layman. What appeared to her was that the respondent and co-respondent were the parents of the child when they visited regularly for one year.

[9] Although she doesn't know the relationship between the respondent and the co-respondent, she was told by them that it was 'their' child.

Testimony of the petitioner ('SP2')

[10] Yew Yin Lai (SP2) is the petitioner. She testified that she was lawfully married to the respondent at on 21 October 1983. They cohabited at No 58-H, Kg Empat off Jalan Ong Kim Wee, 75300 Melaka ('the matrimonial home') and during the marriage petitioner gave birth to two children, a boy Teo Wei Hong on and a girl Teo Shi Wei. Both children have attained age of majority before the trial began.

[11] After her marriage she worked as a purchasing officer with Pacific Food Sdn Bhd and was financially independent for sometime. Later she was made to look after IME Motor Enterprise, a used car business, set up by the respondent for her. She was also selling life insurance.

[12] Some 11 years later, in 1994 the petitioner discovered that the respondent was having extra-marital affair with one Lim Khai Khoo (not sued). The petitioner confronted the respondent and he promised to stop the affair. The petitioner forgave the respondent and the marrige was saved in considerations of the couples children who were still teenagers.

[13] In 1997 the petitioner found out that the respondent was again having another extra-marital affair with a new woman, one Janet Yau Yik Lian, the co-respondent now, when Janet's husband Lee Kim Piau (since deceased) came to see the petitioner and told her what he knew. Incidents during the

subsistence of the marriage led the petitioner to investigate and to her horror in 2002 she also found out that as a result of 'having an illicit intimate relationship' with co-respondent they had two daughters whom the respodent was taking care of. The respondent even invited the co-respondent to important family functions. These facts caused great distress, pain and mental torture to the petitioner. Relationship became strained. Happiness evaporated. Connubial relationships between them ceased. Thereafter the petitioner found it intolerable to live with the respondent. She started sleeping in a separate room. Life with the respondent became unbearable. The respondent started to find fault with everything with her and made the petitioner's life miserable. The petitioner gave evidence that she suffered psychologically. It was more serious than ordinary wear and tear of married life. The marriage had broke down irretrievably.

[14] The petitioner also testified that the respondent was a successful businessman, owned four companies the parent company being Song Huat Chan Holdings.

[15] During the marriage the respondent had voluntarily set up a used car business and had asked the petitioner, IME Motor Enterprise and it was run by the petitioner and her brother Yew Wen Fatt. The Kluang Rubber Company shares were pledged by the respondent to EON Bank to aid this enterprise.

[16] The petitioner also testified that the respondent had bought a bridal shop in Jayamuda Building Orchard Square in Jalan Ong Kim Wee, Melaka, a new Kancil car MAF 7250 worth RM27,000, a Proton Saga car MBU 3345 worth RM22,000 and a two storey terrace house in 2008 in Jalan Tengkera, Melaka for the co-respondent.

[17] Next, Lee Peng Hwa ('SP3') gave evidence about the existence of bird's nest business at Oriental Theatre and as proof tender photographs as exh 63A–I.

[18] Quek Kia Kwong ('SP4') was the company secretary for the respondent's companies and testified that the respondent had transferred 120,000 shares owned by him to his brothers and sisters, but at a lower price than and that was 22 days before receiving the notice of demand in this divorce proceedings, to avoid being claimed by the petitioner as forming part of matrimonial assets.

[19] The fifth witness for the petitioner, Tan Hon Kiat @ Tan Hoon Siong ('SP5') was the auditor and accountant for the four companies of the respondent and gave evidence on the nett value of the shares prevalent at that time and estimated the current values. He also tendered audited accounts of the

parent company Song Huat Chan Holdings as exh P68A–C. Through documents it was shown that the respondent's 120,000 shares in Song Huat Chan Holdings in 2003 were worth RM1,417,200 and that in 2010 they were RM1,852,800.

[20] The petitioner was unable to bring the commissioner for oaths who attested the witness statement or the lawyer who prepared it, for the co-respondent's then living husband Lee Kim Piau.

The respondent's case

[21] The respondent called four witnesses including himself. Yeoh Yee Yean ('SD1'), Mohamed bin Jantan ('SD2') who showed payments from IME Motor Enterprise to him.

Testimony of the respondent (SD3)

[22] Teo Meng Hai ('SD3') testified that the co-respondent is a 'close' family friend of which the petitioner had no knowledge.

[23] The respondent claimed that the 'study loan agreement' with his daughter was to instill responsibility in her and not a commercial transaction with his own daughter which will be unbecoming of a father. The respondent finally called E Chin Chan ('SD4') as his last witness.

[24] The respondent counterclaimed custody of daughter Teo Shi Wei and that the petitioner is ordered to pay maintenance RM1,500 per month for her needs and education, and that the petitioner be given reasonable access to the said daughter. This counterclaim was later withdrawn because Teo Shi Wei already attained the age of majority.

[25] The respondent also wanted back the purported loan of RM182,500 equivalent to 2,000 shares in Kluang Rubber Co which he claims was forced to sell. He also wants the petitioner to redeem 3,000 shares in Kluang Rubber Co, or in the alternative pay the value of the shares within seven days of making the order.

[26] During cross-examination the respondent admitted he ran the bird's nest business of but lost money.

[27] The respondent in his submission said that the petitioner had only hearsay evidence from unnamed sister-in-laws (sisters of the respondent).

[28] Finally the respondent claimed 1/2 share in three storey shop Nos 584, 584A and 584B Taman Melaka Raya which he alleges was puchased through joint effort, or alternatively it be sold and half share of the proceeds be given to him. Further he prayed that the costs of this proceedings be borne by the petitioner, and other reliefs deemed fit and just.

The co-respondent's case

[29] The co-respondent had filed papers before this court the allegations of adultery with the respondent but when her turn came, she elected not to adduce evidence.

THE COURT'S FINDINGS

[30] The respondent stated that the co-respondent was a close family friend. The petitioner denied that the co-respondent was a close family friend. She had no knowledge about the co-respondent being 'a close family friend'. The court believes the petitioner because if the petitioner had knowledge about the co-respondent being 'a close family friend', she would have stated in her petition from the beginning that the respondent was having extra-marital affair with 'a close family friend'.

[31] Through out, the respondent denied the allegation of adultery with the co-respondent and put the petitioner to proof to the satisfaction of the court beyond reasonable doubt and that the onus of satisfying the court rested on the petitioner. This requirement is not denied by the petitioner, and the petitioner submitted that they indeed have satisfied the court beyond reasonable doubt by proving with overwhelming and strong combination of circumstantial evidence that leads to no other conclusion except that there was adultery.

[32] The conduct of the respondent has given the impression to SP2, the babysitter, to assume that the respondent and co-respondent are the natural parents of the co-respondent's child Jasmine Yau *atau* Yau Jia Ying.

[33] SP1's evidence corroborated evidence of SP2 ('the petitioner') that respondent and co-respondent were living in adultery. The respondent said that she was his 'God daughter' and he was her 'God father' (*anak didikan*). I have no reason to disbelief the relevant evidence of SP1, who is a competent witness, as she is not an interested party, she had no axe to grind against the respondent or the co-respondent.

[34] The court heard from respondent that the business, IME Motor Enterprise was run without intervention by him.

[35] The petitioners testimony that the respondent had bought a bridal shop, a new Kancil car, a Proton Saga and a two storey terrance house for the co-respondent was challenged and denied by the respondent for lack of documentary proof.

[36] The court was referred to *Wee Hock Guan v Chia Chit Neo & Anor* [1964] 1 MLJ 217 by the respondent where it was a case of a jealous and highly suspicious husband (the petitioner) who misconstrued the innocent association and correspondence between his wife and a younger-than-him schoolmaster whom she had befriended. He claimed that the wife (the respondent) and school master were in the room, who was also mentor of the petitioner's neglected son, and the petitioner claimed he peeped under the door and saw what he perceived as rubbing each other genitals while fully clothed. The petitioner claimed it as adulterous relationship. The respondent denied it, and said she was rubbing tiger balm on his forehead, in full view of their son also in the same room, and unlikely to do anything horrendous as claimed.

[37] Upon visit to the scene the judge who also peeped under the door, concluded the petitioner could not possibly see above the knee of anybody sitting or standing at the bed, the petitioner had allowed his imagination run wild so he ruled that adultery was not proven *to his satisfaction*. It is different in our case, the respondent had previous addiction to immorality which was forgiven, and had thus indicated adulterous tendencies.

[38] The facts in *Karen Cheong Yuen Yee v Phua Cheng Chuen* [2004] MLJU 291; [2004] 7 CLJ 102 (distinguished) which was submitted by the respondent is also different because in *Karen*'s case it was alleged that the court found that the petitioning wife condoned the adulterous behaviour of the husband.

Application to introduce records from China dissallowed

[39] While the case was being tried the petitioner applied to court to introduce written records from China, and objected to by the respondents, where it was alleged that in the records the respondent and co-respondent were registered as husband and wife. I dissallowed the application because it would be redundant and would involve further delay because this case has been dragged since 2003, the petitioner should have gathered all the facts before filing the petition and before the close of pleadings and should not to seek to introduce them midway through the trial and that too at a very late stage.

PROVING ADULTERY

[40] There are no qualms about on whom the burden lies: he who alleges must prove (s 101 of the Evidence Act 1950):

A Burden of proof

(1) Whoever desires any court to give judgment as to any legal right or liability, dependent on the existence of facts which he asserts, must prove that those facts exist.

B (2) When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person.

[41] Several cases were quoted by all three parties on cases about standard of proof of adultery, on whom the burden lies and how the proof tendered were C accepted or rejected. The facts in the cases were not similar to the present case. In this present case the respondent not only was alleged to have committed adultery with the co-respondent, but also bore two children with her.

[42] The cases quoted discussed phrases such as presumptive proof and D satisfaction beyond reasonable doubt. But there are also well reasoned decisions which explain high degree of probability, satisfaction beyond a shadow of doubt and combination of circumstantial evidence which amount to a certainty preponderance of probability of which is not capable of any other E conclusion.

[43] Preponderence of probability is superiority in weight of an evidence that is more convincing (even if minimally) compared to the evidence presented by the other party.

F

[44] In this present case, there is a decision reported as *Yew Yin Lai v Teo Meng Hai & Anor* [2007] 4 MLJ 703 (referred) where YA Datuk Wira Low Hop Bing, J (as His Lordship then was) decided that 'the standard of proof of adultery is one of beyond reasonable doubt'.

G

[45] In order for the respondent to have committed adultery, it must have been a willing and knowing act consented to by the respondent in violation of his matrimonial obligation not to have sexual intercourse with any other person than the petitioner. Sex loyalty to the spouse is a single loyalty and H cannot admit of division or duality. Ground of relief under this clause is known as adultery in matrimonial law. Adultery is a quasi-criminal offence.

[46] Adultery is generally proved by presumptive proof based upon:

I (a) circumstantial evidence;

(b) evidence of non-access and birth of children (in allegations of adultery against women);

(c) contracting venereal disease from external sources; and

(d) confessions and admissions by parties themselves.

[47] In fact, adultery is seldom susceptible of proof except by circumstances which would lead to that conclusion. For example the birth of a child to the wife, when there was no access to her by husband during possible period of conception shows, without doubt, the adultery by the wife. But, it must be satisfactorily established that birth of the child was clearly as a result of adulterous intercourse. There must be a clear proof of adultery. The prevailing standard of proof to establish a matrimonial offence like adultery is *the satisfaction of court beyond reasonable doubt*.

[48] Adultery has also to be inferred from the circumstances *which exclude any presumption of innocence* in favour of a person against whom it is alleged. Proof of adultery must be of such character as would lead a reasonable man to conclude no other inference than the misconduct. Mere probability is not enough. No implicit reliance can be placed on the bald statement of the wife for recording a finding of adultery against the husband. In the present case it is not bald statement, but strongest circumstancial evidence with high degree of probability beyond any reasonable doubt.

Circumstantial evidence of conduct of the respondent

[49] Individually, all the circumstancial evidence may not amount to required proof. But combined, and based on a myriad of cases, I find that they do.

[50] In the trial a lot of facts were adduced regarding the conduct of the respondent and co-respondent. The court is satisfied that they show beyond reasonable doubt (and not merely the standard of balance of probabilities) the existence of extra-marital affair and adultery between the respondents in this case:

(a) the co-respondent's husband Lee Kim Piau informing the petitioner about the affair whereby the respondent frequently visited and went out with the co-respondent, received lot of calls daily from her;

(b) regular visits by the respondent and co-respondent to baby sitter's house to visit the co-respondent's daughter — see evidence of SP1 the babysitter (narrated at p 4 of this grounds of judgment);

(c) absence of 'nama bapa' in birth certificates of the co-respondent's both daughters and no explanation given by the co-respondent;

(d) delay in registering the birth of the co-respondent's daughters. Only after six years, probably to enroll the daughter in school the co-respondent registered the birth with the authorities;

(e) the respondent objecting to the petitioner seeking order to request him to undergo voluntary DNA test to disprove paternity, and he declining to do so voluntarily;

(f) unsatisfactory or absence of explanation for appearance of the respondent's address in property owned by the co-respondent;

(g) the discovery of the respondent and the co-respondent in a closed room, the scuffle between the respondent and Lee Kim Piau, husband of the co-respondent outside a room, the broken watch, bruises coincide with the struggle Lee Kim Piau had with the respondent, the case was referred to police, but no case was filed probably because it was a family matter. I don't believe the respondent fell, as claimed by him, because a meticulous man will not be so careless as to fall and break his watch. The petitioner's description and explanation of this story remains consistent and unchanged even after cross-examination;

(h) the respondent buying bridal shop in Jayamuda Building Orchard Square in Jalan Ong Kim Wee for the co-respondent, and visiting her there often;

(i) the respondent buying a new Kancil car MAF 7250 worth RM27,000 for the co-respondent which she did not explain;

(j) the respondent buying a Proton Saga car MBU 3345 worth RM22,000 for the co-respondent which she did not explain; and

(k) the respondent buying a two storey terrace house in 2008 in Jalan Tengkera, Melaka using the respondent's address in the transaction, which she did not explain why she used the respondent's address.

In *Lim Siaw Ying v Wong Seng & Anor* [2009] 4 MLJ 409 (followed):

> Circumstantial evidence to prove adulterous affair must be so strong that an innocent by stander would reasonably of the opinon that the alleged act has been committed …

[51] The above said facts in evidence, partly direct, partly circumstantial, to my mind, measure up to the requisite standard of proof for the matrimonial offence of adultery. I am satisfied adultery has been proven.

Delay in registering and absence of father's particulars in birth certificates

[52] Two exhs P27 and P27 are the birth certificates of the co-respondent's two daughters. The column for 'nama bapa' (father's name) in both have been marked with 'maklumat tidak diperolehi' (information not obtained).

[53] Delay in registering and registering after six years was probably for

admission into school and there was no evidence led what caused the delay, except allegation by the petitioner that the respondent is the biological father.

REGISTRATION OF BIRTHS AND DEATHS ACT 1957

[54] Section 13

> …. in the case of an illegitimte child, no person shall as father of the child be required to give information conceringin the birth of the child, and the Registrar *shall not enter in the register the name of any person as father of the child* except at the joint requesto fo the mother and the person acknowledging himself to be th efather of the child, and that person shall in that case sign the register together with the mother. (Emphasis added.)

And further on surname of child:

[55] Section 13A(2)

> The surname, if any, to be entered in respect of an illegitimate child may where the mother is the informant and volunteers the information, *be the surname of the mother*; provided that where the person acknowledging himself to be the father of the child in accordance with the prvisions of section 13 requests so, the surname may be the surname of that person. (Emphasis added.)

[56] Based on this section, the absence of the child's father's name in the birth certificates of both the daughters of the co-respondent is no longer a mere suspicion, I find that there can be no other conclusion than that the co-respondents children are illegitimate.

[57] It is not compulsory under Registration of Births Act or any regulations made thereunder, for a married Chinese woman in Malaysia to put her husband's surname (if he is Chinese and has a surname) as a child's surname. Also, if a child is illegitimate or born out of wedlock, then the child's mother, and a male who admits he is the father can apply for his surname entered in the register of births. They also can register any name.

[58] In our present case it appears from exhs P27 and P28 that no such male has come forward to claim to be the father of the children.

[59] However, it is customary in Malaysia for the children to carry their father's surname as their surname, in this case the co-respondent's husband Lee Kim Piau's surname 'Lee'. In exhibits P27 and P28, the surname of both daughters, bear the surname of the co-respondent 'Yau'. Why? Only the co-respondent will know the answer to this. The petitioner alleged that the respondent is their father. Given the evidence of closeness of the respondent

with the co-respondent, it was not merely suspicious that the respondent may likely be their biological father. The petitioner, to alleviate this suspicion had twice (encl 22 dated 16 May 2007 and encl 61 dated 30 December 2010) applied to court to direct DNA test be conducted. The petitioner was not successful.

[60] This is a case where the petitioning wife alleged that the husband is having an affair with another woman and the said woman has given birth to two children to her husband and in this case I am of the view that the co-respondent should testify who the actual father of her children is.

[61] The respondent in his submissions defends the co-respondent that it is not for the co-respondent or respondent or the children to undergo and satisfy the suspicion of the petitioner and the attempt by the petitioner is a 'fishing expedition'.

[62] But when the burden has shifted to the co-respondent, who is the mother of the children, it is for her to explain to the court who is the father. A person who has knowledge of facts, the burden is on him to testify according to s 106 of the Evidence Act 1950.

[63] And one can draw no other inference except that the co-respondent did not put her husband's surname 'Lee' because he is not their father. The respondent in taking care of the two children, and his overall conduct indicates that he had fathered the co-respondent's two daughters.

[64] The burden has shifted on the co-respondent in the midst of allegations of adultery with the respondent, and unexplained delay in registering the birth of her daughters and the closeness of her with the respondent, and failure to insert the children's father's particulars in the birth register indicate that the respondent had fathered her children. She had knowledge about who the biological father of her children is. She can't leave it to people to guess. It is not for helping the petitioner to prove her case of adultery. It is for adducing evidence to deny the strong circumstantial evidence. The burden has shifted to her. Section 106 of the Evidence Act:

> 106 Burden of proving fact especially within knowledge
>
> When any fact is especially within the knowledge of any person, the burden of proving that fact is upon him.

In *Mayo v Mayo* [1948] 2 All ER 869:

A wife gave birth to a child and, on registering the birth, omitted to give information of the name and surname and rank or profession of the father. And it was held the entry in the register of births omitting these particulars constituted an admissible admission of adultery.

Where there is no other inference can be drawn

[65] In *Wee Hock Guan v Chia Chit Neo & Anor* [1964] 1 MLJ 217 (followed):

An allegation of adultery must be proved beyond reasonable doubt. The evidence must go beyond establishing suspicion and opportunity to commit adultery and must be such as to satisfy the court that from the nature of things adultery must have been committed; where the evidence is entirely circumstantial the court will not draw the inference of guilt unless the facts relied on are not reasonably capable of any other explanation.

[66] The court would not as a general rule infer adultery from evidence of opportunity alone, but would require some more satisfactory proof. In the present case I am satisfied it has been proven.

[67] In the present case there is no other explanation for the conduct of the respondent other than that there was indeed an affair. In this case the respondent and co-respondent had all the opportunity. The respondent had once before admitted to the petitioner, that he did have extra marital affair. He was forgiven by the petitioner. The inference of adultery arises when there is proof of the disposition of parties to commit adultery, together with the opportunity to commit it.

High degree of probability

[68] On 'high degree of probability' I refer to *Miller v Minister of Pensions* [1947] 2 All ER 372 where Lord Denning, J said:

I need not reach certainty, but it must carry a high degree of probability. Proof beyond reasonable doubt does not mean proof beyond the shadow of a doubt. The law would fail to protect the community if evidence is so strong against a man as to leave only a remote possibility in his favour which can be dismissed with the sentence 'of course it is reasonable doubt', but nothing short of that will suffice.

[69] The standard of proof in divorce cases would be such that if the judge is satisfied beyond reasonable doubt as to the commission of the matrimonial offence he would be satisfied within the meaning of s 58(3)(b) of the Act, namely:

A

> if, at the conclusion of the hearing, the *court is satisfied* that adultery between the respondent and co-respondent has been proved … (Emphasis added.)

B

[70] 'Satisfied', a neutral word, does not mean 'satisfied beyond reasonable doubt'. The legislature is quite capable of putting in the words 'beyond reasonable doubt' if it meant it. It did not do so in the Act or the Evidence Act. It simply said on whom the burden of proof rested, leaving to the court itself the duty of assessing *its own satisfaction*.

C

[71] That is because it is not necessary and it is indeed rarely possible to prove the matrimonial offence by any direct evidence for in very few cases can such proof be obtainable. In the said section legislature does not use expression 'court is satisfied on evidence', but the expression used is 'if the court is satisfied'. But the omission of the word 'evidence' after the word 'satisfied' is

D

immaterial, as the satisfaction, of the court has to be based on evidence led in the case.

[72] Even in criminal cases, where the standard of proof is higher than civil and quasi-criminal cases, a combination of circumstantial evidence do amount

E

to proof beyond doubt. Circumstantial is evidence of facts which are relevant to a fact in issue, that is, facts from which, when they are taken together, the existence of the fact in issue may be inferred because those facts make the existence of the fact in issue more probable than it would have been without that evidence. It is not necessary that each fact should be unequivocally relevant

F

to the fact in issue. Indeed 'an item of circumstantial evidence is nearly always susceptible of an innocent explanation'.

[73] What is required is that the several facts taken together, their coherence of a single story, should be capable of supporting the probability that the fact in

G

issue exists. In the words of Hume (*Morton v HM Advocate* 1938 JC 50 at p 52 per LJ-C Aitchison, *Veronica Sharkey or Little Elaine Freida Haggarty v Her Majesty's Advocate* 1983 SCCR 56 at p 61):

H

> 'the *aptitude and coherence of the several circumstances* often as fully confirm the truth of the story, as if all the witnesses were deponing to the same facts'. Where the Crown relies on circumstantial evidence, the degree of probability required for proof of the fact in issue is that which is beyond reasonable doubt

I

[74] It would be unreasonable to expect direct evidence of adultery. Normally the matrimonial offence of adultery is expected to be established by circumstantial evidence, but in that event the circumstances must be such as *lead to the necessary conclusion that adultery was committed* by the spouse concerned. On the other hand it would not be possible to lay down what circumstances would be sufficient to establish adultery, because circumstances

may be diversified by the situation and character of the parties, by the state of general manners and by many other incidental circumstances, apparently slight and delicate in themselves, but they may have important bearing on the particular case.

> The only general rule upon the subject is that the circumstances must be such as would lead to a guarded judgment of a reasonable and just man to the conclusion — the general rule laid down by *Lord Stowell (when Sir William Scott) in* (1810) 2 Hag Con 1

A danger in asserting what the statute does not assert

> The statute requires the court to be satisfied on the evidence. The statute does not say that the charge of adultery must be proved beyond reasonable doubt. Why say then what the statute does not? Therein lies the danger, because of the temptation it affords to give effect to shadowy or fanciful doubts
>
> I think the real reason why the judge fell into error may have been that he required an excessively high standard of proof. I would issue a caveat about the standard of proof. I do not think that this court is irrevocably committed to the view that a charge of adultery must be regarded as a criminal charge to be proved beyond all reasonable doubt.
>
> Lord Denning in *Gower v Gower* [1950] 1 All ER 804

[75] Proof beyond reasonable doubt means such proof as it precludes every reasonable hypothesis except that which it tends to support. It need not reach certainty, but must carry a high degree or preponderance of probability.

[76] The quantum of evidence that constitutes a preponderance cannot be reduced to a simple formula. A preponderance of evidence has been described as just enough evidence to make it more likely than not that the fact the petitioner seeks to prove is true. It is difficult to translate this definition and apply it to evidence in a case, but the definition serves as a helpful guide in determining whether the petitioner has carried her burden of proof.

Adultery can be proven by preponderance of probability if direct evidence is not available

[77] With the development of science, the Supreme Court in *Dastane v Dastane* AIR 1975 SC 1534 elaborated the subject further on the point of the standard of proof of adultery. This court's full bench judgment in *Lalit Lazarus v Lavina Lazarus* 1979 Jab LJ 299 AIR 1979 Madh Pra 70 is as under:

> Previously the view was that the matrimonial offences have to be proved by the petitioner beyond doubt but recently the view has been modified and it has been held that petitioner is only required to prove his case by preponderance of probabilities and the degree of probability depends on the gravity of the offence.
>
> It is wrong, therefore, to apply an analogy of criminal law and to say that adultery must be proved with the same strictness as is required in a criminal case. As far as the standard of proof is concerned, adultery, like any other fact on which irretrievable breakdown of marriage is concerned, may be proved by a preponderance of probability; and although it has been said that in proportion as the offence is grave, so ought the proof to be clear, and that even in these days there is a stigma in adultery, nevertheless views on adultery have changed and it no longer generally entails the serious social consequences that in some former times resulted from its discovery.

[78] Analogies and precedents of criminal law have no authority in the divorce court, a civil tribunal. Therefore, I am of the view that if is not proper to apply the analogy of criminal law. Do not say that adultery must be proved with the same strictness as is required in a criminal case. To say simply, it must be proved to the satisfaction of the court, by a preponderance of probability, just as any other civil case is.

[79] In the present case I therefore hold that adultery has been proven by a fair and reasonable preponderance of credible evidence. We should not lose sight of the implications of extra marital affairs which smear the sanctity of the institution of monogamus marriages which the Act seeks to protect. Extra marital affairs should not be condoned under the pretext of needing exact proof because they not only break up households but also injure the innocent children and damage their future causing embarasment, stress and anxiety. In the present case, I believe, it also resulted in two children for the co-respondent, and they have to live in the society with the stigma of being 'illegitimate children' for the rest of their lives.

[80] Therefore the conclusion that the respondent has committed adultery with the co-respondent appears more likely than not. From the facts adduced, there is a high degree or preponderance of probability that adultery has been committed. I therefore hold that adultery has been proven to my satisfaction beyond reasonable doubt.

The respondent's refusal to undergo voluntary DNA test and s 114(g) of the Evidence Act

[81] The DNA test on the respondent and on the two children of the co-respondent would have either exculpated the respondent totally and that they are not his offsprings or confirmed the possibility that he could be the

biological father. During his testimony it was alleged that the two daughters of the co-respondent are his. He denied plainly that he is the father of neither girls. Having the financial means, he could even have undergone extended DNA and other genotypic tests to be 100% sure that the two girls are not his offsprings. Why didn't the respondent undergo voluntary DNA tests requested by the petitioner, unless it would incriminate him? That no individual could be compelled to give blood samples even for medical examination, settled positions have put a legal embargo on the courts to order DNA test in a routine manner and it is then incumbent upon him to prove otherwise. It is for the parties to adduce evidence in support of their claims and establish their stands.

[82] The evidence which could be and is not produced would, if produced, be unfavourable to the person who withholds it. What other reasons could there be for the respondent's refusal unless it be unfavourable to him, except that he may be their father? Why then visit them and care for them? The respondent was seen together with and caught in a room with the co-respondent by the co-respondent's late husband. He had ample access to the co-respondent. I am more than convinced that he hesitates because on a balance of probabilities they may be his biological daughters. The paternity of the co-respondent's daughters are an issue in this case because it was alleged that they were begotten by respondent's adultery with the co-respondent. (*Ong Boon Hua @ Chin Peng & Anor v Menteri Hal Ehwal Dalam Negeri, Malaysia* [2008] 3 MLJ 625 followed; *Sundram v Arujunan & Anor* [1994] 3 MLJ 361 followed.)

The co-respondent electing not to adduce evidence from witness box and offering to be cross-examined

[83] At the close of the respondent's case, the co-respondent submitted she has no case to answer and elected not to adduce evidence from the witness box or to strongly rebut in vehemence all allegations of adultery made against her by the petitioner which tarnishes the co-respondent's reputation. She was the most material witness to refute the contention of the petitioner that she was having extra-marital relationship and committed adultery with the respondent and to assert that she is a woman of virtue. She offerred herself to be cross-examined. But this was not taken up by the petitoners' counsel stating it is irregular. She also did not call any witness on her behalf. Her non-production in evidence is most material circumstance in favour of the petitioner and against the respondent.

[84] In view of all these circumstances coupled with the evidence of the petitioner and her witnesses, I find that the evidence produced by the petitioner is much more weighty than the evidence produced by the respondent.

[85] Presumptions are necessarily made against parties having knowledge of the facts in dispute will not subject themselves to examination. It is trite law that once a defendant in civil proceedings makes a submission of no case to answer and elects not to call evidence, then all evidence led by the petitioner must be assumed to be correct (*Takako Sakao (f) v Ng Pek Yuen (f) & Anor* [2009] 6 MLJ 751 (followed); *Yoong Sze Fatt v Pengkalen Securities Sdn Bhd* [2010] 1 MLJ 85; [2010] 1 AMR 448 (followed)).

[86] In the celebrated and oft-quoted case of *Loveden v Loveden* (1810) 2 Hag Con, 1, in which the judgment was rendered by one whom the Earl of Selborne, Lord Chancellor, in *G (The Husband) v M (The Wife)* (1885) 10 AC 171, described as 'a judge of the greatest possible eminence, no less a person than Lord Stowell', Sir William Scott in 1810. It was a case of adultery too. And the general rule laid down by Lord Stowell (then Sir William Scott) is:

> The only general rule that can be laid down upon the subject is, that the circumstances must be such as would lead the guarded discretion of a reasonable and just man to the conclusion; for it is not to lead a rash and intemperate judgment, moving upon appearances that are equally capable of two interpretations, neither is it to be a matter of artificial reasoning, judging upon such things differently from what would strike the careful and cautious consideration of a discreet man. The facts are not of a technical nature; they are facts determinable upon common grounds of reason; and courts of justice would wander very much from their proper office of giving protection to the rights of mankind if they let themselves loose to subtilties, and remote and artificial reasonings upon such subjects. Upon such subjects the rational and legal interpretation must be the same.

[87] The co-respondent elected not to give evidence and submitted no case to answer and did not call any witness on her behalf.

[88] Based on oral and documentary evidence adduced by the petitioner and her witnesses, the petitioner had established a case in law for the co-respondent to answer. That being the case, the co-respondent had failed to show that the evidence of the petitioner in support of her claim is so unsatisfactory or unreliable that the burden of proof on the petitioner of relevant issues has not been discharged.

In *Yoong Sze Fatt v Pengkalen Securities Sdn Bhd* [2010] 1 MLJ 85) it was stated that:

> It is trite that once a defendant in a civil proceedings makes a submission of no case to answer and elects not to call evidence, then all evidence led by the plaintiff must be assumed to be correct.

[89] In *Lafarge Concrete (M) Sdn Bhd v Hasrat Usaha & Anor* Mahkamah Tinggi Kuala Lumpur GS No D10-22–1484 of 2005 YA Dato' Mary Lim Thiam Suan said: A

> Order 35 r 4(5)(c) of the Rules of the High Court 1980 provides for the order of speeches where there are several defendants and where one of them opts to adduce evidence while the other proceeds to adduce evidence. It does not however, deal with the matter of the right to crossexamine witnesses in such circumstances. For this, one must bear in mind the significance of the election when a defendant submits there is no case to answer, be it because the plaintiff has not established its case or that the burden of proof has not been discharged. This becomes trickier when there are several defendants involved, each taking a strategic judgmental call in order to advance their diametrically opposing interests, each seeking to exculpate and establish blame on any other save on itself. The election must be made; otherwise an unsuccessful defendant whose submission of no case to answer has been rejected by the court may then call evidence. Generally, a court should try cases in its entirety, taking all evidence and hearing all the parties before making a determination. In a situation where there are multiple defendants, that would include the evidence to be offered by the defendants who have opted to adduce evidence. Otherwise, there is the danger of the court and more importantly, the innocent plaintiff left with no recovery

B C D E

[90] In *UN Pandey v Hotel Marco Polo Pte Ltd* [1980] 1 MLJ 4; [1978–1979] SLR 490 where TS Sinnathuray J said by an addenda to his oral judgment:

> On the subject of no case to answer, a summary of the practice of the Courts of England is to be found in the White Book at 35/7/2. The last time the practice was judicially considered is in the Court of Appeal decision *Storey v Storey* [1963] P 63 (CA):
>
> > There are, however, two sets of circumstances under which a defendant may submit that he has no case to answer. In the one case there may be a submission that, accepting the plaintiff's evidence at its face value, no case has been established in law, and in the other that the evidence led for the plaintiff is so unsatisfactory or unreliable that the court should find that the burden of proof has not been discharged.

F G H

[91] In our case, the co-respondent's contention is that the petitioner had led unsatisfactory or unreliable evidence is a folly. It is for the court to make this ruling after hearing the evidence and seeing the exhibits.

[92] The co-respondent submitted that the petitioner merely alleged the respondent's first affair with one Lim Khai Khoo, and that Lim Khai Khoo was not called as a witness and that adverse inference, that it may not be true must be drawn against the petitioner for failing to produce Lim Khai Khoo. The petitioner did not sue the said Lim Khai Khoo. Why should the petitioner call I

this Lim Khai Khoo when the affair was forgiven when respondent told the petitioner that he will not do it again, and the petitioner forgave him to save the marriage which had two teenage children?

[93] Instead she should take the stand and explain the delay in registering the birth of her child, and the absence of the child's father's particulars in the birth certificate which was alleged and do indicate a very high suspicion that her girls are offsprings of adulterous affair with the respondent.

The petitioner's claim for division of matrimonial properties

[94] Section 76 of Act 164 relates to the power of the court to order division of matrimonial assets acquired during marriage by the joint efforts of parties. Subsection (2) provides in the exercise of such power the court shall have regard among others to 'the extent of the contribution made by each party in money, property, or work towards the acquiring of the assets' and subject to the aforesaid considerations 'the court shall incline towards equality of division' (*Koay Cheng Eng v Linda Herawati Santoso* [2008] 4 MLJ 863; [2008] 4 CLJ 105 (followed))

The respondent's counterclaims against the petitioner

[95] The RM182,500 was for the IME Motor business and not a personal loan to the petitioner. The respondent failed to prove that it is in fact a personal loan to the petitioner. He himself said he is not sure about it during cross-examination. At p 257 of the notes of evidence:

> Q That is not my question. My question is whether the loan by EON given to Pempetisyen personally or is for her IME business?
>
> A Saya tidak pasti, ini merupakan hal Pempetisyen.

[96] From overall evaluation of evidence, and having sight of the accounts and exhibits, it plainly appears to this court that it was capital injected voluntarily into the IME Motor business by the respondent, which business was set up by the respondent for the petitioner, allegedly to keep her busy. The court finds that it is not the other way around as alleged by the respondent in his submissions that the petitioner was doing this car business was also busy with her life insurance work therefore always busy and negleted the family.

[97] The respondent claimed to transfer the ownership for the three storey shop lot purchased by the petitioner saying they were purchased with 'joint effort'. Alternatively he claimed half share from sale of the three storey shoplot.

From overall evaluation of evidence, it appers to this court that the shop lot was purchased by the petitioner after the marriage has broken down.

[98] The claim of half share of this shop lot purchased by the petitioner by the respondent against the petitioner appears to be an after thought to intimidate the petitioner to back off from her claims in this proceedings. Further, these properties were bought by the petitioner after the marriage has practically broken down. The respondent's counterclaims are therefore dismissed.

CONCLUSION

[99] After appreciation of the oral and documentary piece of evidence on record, having heard the evidence of the witnesses from both parties, having observed the demeanor of witnesses, and having gone through the affidavits filed and exhibits tendered, and having read the written submissions of both parties, I am satisfied beyond reasonable doubt that the respondent committed adultery with the co-respondent.

[100] The petitioner has satisfied me that her story is true. The probabilities were in favour of the petitioner, I am certainly satisfied beyond reasonable doubt that the evidence called by the petitioner should be accepted. I am also satisfied that on balance of probabilities that the breakdown of the marriage was caused by the conduct, deeds, adultery and connivance of respondent with the co-respondent all of which had contributed to the breakdown. This court is concerned not to punish any one, but to give statutory relief from a marriage that has irretrievably broken down. I allow the claims by the petitioner as follows.

Awarding arrears of maintenance

[101] The petitioner claimed for arrears of maintenance RM2,000 a month for 108 months (from 28 July 2003–28 July 2012) amounting to RM360,000 or a lump sum payment of RM250,000. I ordered that the respondent is to pay the petitioner, maintenance of RM2,000 a month for 15 years effective from the date of filing amounting to RM360,000. Interest 4%pa on the arrears of maintenance RM2,000 x 108 months.

[102] Interest 4%pa on RM216,000 until full realisation (RM360,000 –RM216,000 = RM144,000 is without interest).

[103] It is trite law that the petitioner is entitled to live with the same comfort and standard as that which the petitioner was accustomed to during her marriage. However s 78 of the Act reads:

Section 78 of the Act

> In determining the amount of any maintenance to be paid by a man to his wife or former wife or by a woman to her husband or former husband, the court shall base its assessment primarily on the means and needs of the parties, regardless of the proportion such maintenance bears to the income of the husband or wife as the case may be but shall have regard to the degree of responsibility which the court apportions to each party for the breakdown of the marriage

I have considered the wealth, business concerns and financial capacity of the respondent in arriving at this conclusion.

Awarding the petitioner's claim for part of the value of matrimonial home

[104] The respondent's evidence was that it was not the matrimonial home but ancestral home even though it was not denied that all his brothers obtained one matrimonial home after their marriage, and it was the custom of the respondent's family. The matrimonial house is a gift from his mother to the respondent, as for any his other brothers upon their marriage. In view of the fact that the petitioner had made contributions in the form of domestic services to the respondent husband and towards the welfare of the family and by looking after the two children and bringing them up, the claim for part of matrimonial home is allowed at RM175,000.

(*Chaw Anui v Tan Kim Chai* [2004] 4 MLJ 272; *Doris Howell v Pui Jin Kong & Anor* [1998] MLJU 395; [1999] 1 AMR 476 (followed)).

Awarding the petitioner's claim for the shares and part of other matrimonial assets

[105] The petitioner has claimed RM500,000 under s 76 of the Act, from 120,000 shares in Song Huat Chan Holdings, proceeds from lucrative bird's nest venture, profits from shares in public listed companies owned by the respondent, moneylending business and real estate business. It is a liquidated sums. The petitioner ought to have produced evidence through chartered accountants or other means. The petitioner failed to produce such evidence. So this claim is dismissed.

Dismissing the counterclaims by the respondent

[106] As explained for the reasons herebefore the counterclaims by the respondent are dismissed. The respondent's testimony appears more of an after thought to evade paying maintenance to the petitioner or part with the matrimonial assets.

The co-respondent to pay damages

[107] The co-respondent had contributed to the break down of the marriage

is to pay damages RM50,000 with 4% interest from the date of judgement until full realisation. However, this amount is very minimal which does not contain exemplary or punitive element (as per s 58(3)(b) of the Act). The Act does not punish the adulterous party personally, or inflicted any pecuniary penalty. Considering the circumstances that the co-respondent caused the breakdown of petitioner's family, caused the petitioner untold anxiety, emotional trauma and great mental agony. The co-respondent had stolen the petitioner's husband and deprived his wife of a happy and peaceful mind in the latter's otherwise blissful wedded life. Damages for the agrieved spouse's feelings and unhappiness are impossible to establish mathematically.

Awarding costs of the proceedings

[108] Costs of the proceedings throughout to be borne by the respondent and co-respondent. In *Mohan Singh v Malkiyat Kaur* [1978] 2 MLJ 181:

> When a wife had to take proceedings against her husband or he against her she ought to be provided at his expense with the means of bringing the case before the court or of properly defending the case against her. Whether she was successful or not the rule was that the costs properly incurred in bringing her suit before the court, or in defending the attack made on her, ought to be paid by her husband.

This is especially so, when the court has found that the adultery of the respondent with co-respondent had caused the breakdown of this marriage.

Application allowed.

Reported by Afiq Mohamad Noor